



Sparta v Al-Hamed & 2 others (Environment & Land Petition E002 of 2024) [2025] KEELC 4894 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E002 OF 2024**

**SM KIBUNJA, J
JULY 2, 2025**

BETWEEN

ROSARIO SPARTA PETITIONER

AND

MOHAMED H. AL-HAMED 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

(PETITIONER'S N/M DATED 27th MARCH 2024 & 22nd JANUARY 2024 [SIC], 1st & 2nd RESPONDENTS' N/M DATED 4th SEPTEMBER 2024, 1st RESPONDENT'S P.O DATED 11th APRIL 2024, 3rd RESPONDENT'S P.O DATED 15th APRIL 2024, 2nd RESPONDENT'S DATED 20th JUNE 2024)

RULING

1. The petitioner filed the notice of motion dated 27th March 2024, seeking for inter alia;
 - a. Temporary injunction order restraining the 1st respondent from further emitting intrusive high levels of noise and vibrations in his construction site immediately adjacent to the the applicant's premises known as subdivision No. 6233 (original No. 5440/3) Section 1 Mainland North, in contravention of the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009, to issue pending the hearing and determination of the application;
 - b. Temporary injunction order restraining the 1st respondent from further undertaking all construction activities in his construction site immediately adjacent to the the applicant's premises known as subdivision No. 6233 (original No. 5440/3) Section 1 Mainland North, in



contravention of Sections 57(1) & (2) and 58 of the Physical and Land Use Act and or Sections 42 & 58 of the Environment Management and Coordination Act, pending the hearing and determination of the application and or petition.

c. Costs.

The application is based on the nineteen (19) grounds on its face and supported by the affidavit Rosario Sparta, the petitioner, sworn on the 27th March 2024.

2. The 1st respondent opposed the petition and the application through his replying affidavit sworn on the 19th April 2024. He also filed the notice of preliminary objection dated 11th April 2024 to the petition raising four grounds all on the court's jurisdiction on the issues raised in the petition and application, in view of the doctrine of exhaustion.
3. The 2nd respondent filed the notice of preliminary objection dated 20th June 2024, on both the petition and application, raising six (6) grounds turning on the question of the court's jurisdiction in the petition and application on matters EIA license and related issues which under section 129(1) of EMCA, and section 78(b) of PLUPA, should be handled by NET and or County Physical and Land Use Planning Liaison Committee respectively.
4. The 3rd respondent also opposed the petition and application through the notice of preliminary dated the 15th May 2024 raiding three grounds that primarily amount to the question of court's jurisdiction in the issue raised by the petition and application.
5. The 1st and 2nd respondents filed the notice of motion dated 4th September 2024, seeking for inter alia;
 - a. The stay of execution of the order issued on the 15th May 2024, pending the hearing and determination of the application; and
 - b. Set aside and or vacate in its entirety the order issued on 15th May 2024.

The application is based on the eleven (11) grounds on its face and supported by the affidavit of Mohamed H. AL-Hamed sworn on the 4th September 2024.

6. The petitioner filed her second application dated the 22nd January 2024 [sic], seeking for inter alia:
 - a. That the 1st respondent, Mohamed H. AL-Hamed to be cited for contempt of court and be committed to civil jail for a period of six (6) months for wilfully, blatantly, defying, disobeying and contemptuously breaching a valid court order issued on 15th May 2024.
 - b. That warrants of arrest do issue for the said Mohamed H. AL-Hamed to be brought before this court to show cause why he should not be punished by way of committal to civil jail or any other such sentence as the court may deem necessary for blatant breach and contempt of court.
 - c. The court to undertake a site visit on the suit property for purposes of confirming the contempt.

The application is predicated on the eleven (11) grounds on its face, and supported by the affidavit of Posario Sparta, sworn on the 22nd January 2024.

7. The court heard counsel for all the parties on the 15th May 2024 and issued directions that the notice of motion and preliminary objections filed be canvased together, filing and exchanging replies and submissions. The court also granted interim order of injunction in terms of prayer (5) to be in force until the next date. When the matter came up again on the 24th June 2024, the counsel for the petitioner and 1st respondent informed the court that they were negotiating for an out of court settlement



and a mention date of 25th July 2024 was fixed. On that date the counsel for the petitioner and 1st respondent disclosed that the negotiations between their parties had failed. The counsel for the petitioner then notified the court that his client would be filing a contempt application. the counsel for the 1st respondent responded stating that his client had continued with the construction with agreement of the petitioner during the negotiations. The court extended the interim orders , and on 28th October 2024 and 17th February 2025, gave further directions on canvassing all the applications and preliminary objections filed together, filing and exchanging replies and submissions. The matter was then set down for 7th April 2025, when the petitioner was given seven days to file submissions and ruling date was fixed.

8. The learned counsel for the 1st and 3rd respondents filed their submissions dated the 14th June 2024 and 17th June 2024 respectively which the court has considered.
9. The following issues are invariably the ones for determinations by the court;
 - a. Whether this court is with jurisdiction in the issues raised in the petition and application in view of the doctrine of exhaustion.
 - b. Whether the petition raises any constitutional issue.
 - c. Whether the 1st respondent has disobeyed the order of 15th May 2024, and if so whether he should be cited for contempt.
 - d. Whether injunction order sought should be issued pending the hearing and determination of the petition.
 - e. Who pays the costs in the applications and preliminary objections.
10. The court has carefully considered the grounds on the applications, preliminary objections, affidavit evidence, submissions by the learned counsel and come to the following conclusions:
 - a. The three preliminary objections raised by the 1st to 3rd respondents raises more or less the same questions of the petitioner’s failure to exhaust the statutory dispute resolutions alternatives before approaching the court in a constitutional petition, and hence the court’s jurisdiction. From the petition and application and the prayers thereof, the petitioner’s complaints is primarily the construction activities and intrusive high levels of noise and vibrations emanating from the respondent’s construction site that is adjacent Subdivision No. 6233 (original No. 5440/3) Section 1 Mainland North. The 1st respondent has submitted that disputes over the noise emanating from a construction site should be dealt with in accordance with are Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009, which prohibits excessive noise and vibrations. The regulations lays out the complaints procedures in the event one feels aggrieved by the noise emanating from such a site.
 - b. The petitioner herein has jumped the gun by coming to court in a constitutional petition, without first letting the establishments created to address such complaints deal with it exhaustively. The learned counsel for the 1st respondent cited among others, the case of Wildlife Director (Kenya) versus Kenya Wildlife Services & 4 Others; Kenya Wildlife Services (Defendant); National Environment Management Authority (Interested Party) [2020] eKLR, where the court dealt with a matter similar to the instant one and held that:

“ 31. The present matter though coached as a constitutional petition in real sense is a Wildlife Conservation and Management matter



which the Wildlife Conservation and Management Act read together with Environment Management and Coordination Act 1999 have provided adequate dispute resolution mechanisms which the petitioner ought to have invoked rather than come to this court. In the Court of Appeal case of *The Speaker of the National Assembly versus James Njenga Karume* (1992) eKLR, cited by the 1st respondent's counsel, the court stated as follows in regard to the exhaustion doctrine:

“....Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.”

32. On the basis of the authorities I have referred, it is my view this court lacked jurisdiction to entertain the petition as a court of first instance and on that account the petition must fail.”

The counsel also referred to the case of *Wainaina Kenyanjui & 2 Others versus Andrew Ng'ang'a ELCC No. 214 of 2013*, where the court held that it has exclusive jurisdiction in matters relating to the use, occupation and title to land and the environment under Article 162(2)(b) of the constitution and then went on to hold that:

“However, despite this exclusive jurisdiction, this court will defer to statutory provision which provides effective remedies and procedures to a dispute that is before it, and may, require that such remedies and procedures be exhausted first in appropriate circumstances.”

The counsel further submitted that this petition should have been avoided, as the dispute could have been dealt with through the statutory alternatives provided.

- c. On his part, the learned counsel for the 3rd respondent submitted this court has no jurisdiction on the issues raised in the petition and application and relied on the following cases among others; *Mukhisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd* [1969] E. A. 696, *County Government of Migori versus I N B Management IT Consulting Ltd* [2019] eKLR, and *Samuel Kamau Macharia & Another versus Kenya Commercial Bank & 2 Others*, Appl. No. 2 of 2011, and submitted that the issues herein are within the province of National Environment Tribunal under section 129 of EMCA, and may only come to this court on appeal under section 130 of the said Act. The counsel cited the Court of Appeal case of *Kibos Distrubutters Ltd & 4 Others versus Benson Ambuti Adegga & 3 Others* [2020] eKLR, in support of their contention, and sought for the petition and application to be dismissed with costs.
- d. In the Supreme of Kenya case of *Communications Commission of Kenya & 5 Others versus Royal Media Services Limited & 5 Others* [2014] eKLR, where the court held that:

“

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In the South African, in *S. v. Mlungu*, 1995 (3) SA 867 (CC)



the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority judgement as follows [at paragraph 59]:

“I would lay it as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.”

(257) Similarly, the U. S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347 (1936).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd, and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copy right – infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

The petitioner’s complaint through the application is purely one of excessive construction related vibrations and noise pollution to the environment, while the prayers sought in the petition includes declarations of violations of right to property; that construction was done without NEMA approval and development permissions under EMCA and PLUPA respectively, and injunctions.

- e. From the facts disclosed by the petitioner at paragraphs 25 to 42 of the petition it need no gainsaying that the complaints deductible thereof are of issues that could have been lodged and dealt with within the framework under section 129(1) of EMCA, Sections 57(1) & (2) and 58 of the *Physical and Land Use Planning Act* and or Sections 42 of the Environment Management and Coordination Act. Thereafter, any party(s) not satisfied would then be at liberty to move to this court on appeal. Indeed, there is nothing in the issues raised in the petition that constitute a constitutional petition for this court’s exclusive jurisdiction to be invoked in the manner the petitioner did. In view of the superior courts decisions that the respondents’ learned counsel cited, including the ones set out above, the court finds that the petitioner approached this court prematurely, without first exhausting the alternative dispute resolution mechanisms under EMCA and PLUPA.
 - f. That having upheld the preliminary objections by the respondents, that as it were, have determined both the petition and application dated the 27th March 2024, the court does not need to pronounce itself on any other pending application or matter, but just to down its tools as dictated by the decision in the case of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd [1989] KLR 1. Both the application and petition dated 27th March 2024, are for striking out.
 - g. On the question of costs, and having found the petitioner invoked the jurisdiction of this court before exhausting the statutory alternatives, the respondents are awarded costs.
11. In view of the foregoing determinations on the three preliminary objections raised by the respondents, the court orders as follows:
- a. That the three preliminary objections to the application and petition dated 27th March 2024, are hereby upheld.



- b. That the petitioner's application and petition dated the 27th March 2024 are hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Petitioner : Mr Amadi

Respondents : Mr Ambala For Maulidi For 1st Respondent

Mr. Tajbhai For 3rd Respondent

Shitemi-court Assistant.

